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February 23, 1979

Honorable Morris K. Udall
Chairman
House Committee on Interior and
Insular Affairs
1324 Longworth Building
Washington, D.C. 20515

Dear Chairman Udall:

This letter is prompted by the Jack Anderson articles of the last three days concerning Koniag and the Koniag villages.

Like a writer of whodunit plays, Mr. Anderson builds his drama to a third act climax finally revealing the plot. Capping hints tossed out in the first two acts, Friday's article reveals that Mr. Anderson is after the Koniag Amendment and his theme is that Leisnoi, which Mr. Anderson grudgingly concedes is a certified village, with the assistance of the seven uncertified villages, are somehow going to enable Koniag to make off with Afognak Island.

Bunk!

As we have explained over and over, there is not an

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acre of Afognak Island that, under the Koniag Amendment, would be conveyed to the Natives by reason of the uncertified villages. In respect of Afognak Island, the Koniag Amendment would operate in exactly the same way without the uncertified villages. Furthermore, not one cent more will be paid from the Alaska Native Fund on account of Koniag, Koniag Natives, or the Koniag village corporations.

In a letter of January 25 to Steve Silver of Senator Stevens' staff, I analyzed the impact of the Koniag uncertified villages on the Koniag Amendment. Rather than repeat what is said there I enclose a copy.

Now, as respects Leisnoi. Leisnoi is a certified village. It went through the administrative process established by the Secretary of the Interior under ANCSA to determine village eligibility. Leisnoi was certified by the Secretary of the Interior after its examination by the BIA which was charged with examining each and every village that claimed eligibility under ANCSA.

The administrative process established by the Secretary afforded anyone wishing to dispute or object to the eligibility of an applicant for village status the opportunity to do so. Wide publicity was given to the pendency of applications for eligibility. The simple fact is that those residents of Kodiak, Alaska who are referred to in Mr. Anderson's second article, that of February 22, as the "Citizens Action Group"

and who are now attempting through Mr. Anderson's "good offices" to deprive Leisnoi of its eligibility, had their opportunity to protest and to obtain an evidentiary, trial-type hearing from the Department of the Interior in the fall of 1973 and the spring of 1974 when Leisnoi's eligibility was considered. They did not avail themselves of that right.

ANCSA required [§11(b)(3)] that the Secretary of the Interior within two and a half years after December 18, 1971, the date of ANCSA's enactment, determine eligibility of villages not listed in section 11(b)(1).

With that deadline in mind, the regulations of the Department established September 1, 1973 as the deadline for applications for certification by unlisted villages and provided an opportunity for protest and hearing. 43 C.F.R. §§2651.2(a)(6), 9, 10, 38 F.R. 14223 (May 30, 1973). The hearing on Leisnoi, by the way, would have been held, had anyone requested one, in Kodiak, not in far off Washington, D.C. or any other inconvenient place. Nine separate and widely publicized village eligibility hearings were held in Kodiak in 1974. The filing of village eligibility applications was widely publicized in the local Kodiak papers and village eligibility was a widely discussed topic in Kodiak. Anyone in Kodiak and vicinity who would have wanted to object to a village's eligibility application but who was unaware of the opportunity to do so and to obtain a hearing

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would have had to have been entombed for a year and a half in the proverbial underground salt mine, completely out of touch with the world.

But the handful of people in Kodiak who are now, through Mr. Anderson's column, trying to "get" Leisnoi through derailing the Koniag Amendment, neither filed protests nor sought a hearing.

Almost two years after Leisnoi's certification (which had occurred on September 9, 1974), some individuals in Kodiak, who it later developed are apparently the nucleus of the Citizens Action Group, filed a lawsuit against the Secretary of the Interior in the Federal District Court in Anchorage attacking Leisnoi's eligibility. Among the allegations of the complaint were a charge of fraud, but without specifics as required by Rule 9(b) of the Federal Rules of Civil Procedure. (Kodiak-Aleutian Chapter, et al. v. Kleppe, No. A76-182, Civil). Neither Leisnoi nor Koniag were named as parties to that action. The Federal District Court on December 7, 1976 (423 F. Supp. 544), entered an Order which, as respects the charge of fraud, required the plaintiffs to "put up or shut up" as required by Rule 9(b) of the Rules of Civil Procedure. The plaintiffs chose to shut up. These are the same people who are, with Mr. Anderson, once again screaming fraud.

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An amended complaint was filed shortly after the December 7, 1976 Order, this time devoid of any charge of fraud. Leisnoi and Koniag were named as defendants, along with the Secretary of the Interior. The complaint alleged that two individuals in Kodiak, Omar Stratman and Toni Burton, claimed to hold grazing leases from the United States, on lands (that had been TA'd to the state prior to passage of ANCSA) which comprise a small part of the area on Kodiak Island selected by Leisnoi under ANCSA. They challenged Leisnoi's eligibility on the ground that there would be interference with their property interests as the holders of grazing leases. Other individuals who joined as plaintiffs simply alleged that they occasionally used the land for hunting, hiking, etc. As to these latter individuals, the District Court in its Order of December 7, 1976, held that by failing to have protested and asked for a hearing from Interior when Leisnoi's application for eligibility was under consideration, they had forfeited any right to complain. They took no appeal.

As to Stratman and Burton, the Court permitted the lawsuit to proceed because of a claimed lack of personal knowledge on their part that the Department of Interior had scheduled an opportunity for protest and hearing on Leisnoi's application. This assertion of lack of knowledge is simply an unproven claim. We dispute it and consider it incredulous

in view of the wide publicity given such matters in Kodiak, where both resided, in 1973 and 1974. Stratman and Burton also claimed that had the lands on which they held grazing leases been conveyed to the State of Alaska (since it was TA'd land it would have gone to the State but for Leisnoi's selection), they would have had a right under Alaska law to state grazing leases following expiration of their federal leases which still had something like 20 years to run in any event.

In our opinion, Stratman and Burton's claims that their grazing leases were threatened by Leisnoi are not well founded. To begin with, grazing leases are "valid existing rights" under ANCSA, which remain with the holders regardless of Native selection. ANCSA, §14(g). Nobody disputes that, least of all Leisnoi and Koniag. Second, assuming that Alaska law would have given Stratman or Burton a right to later state leases if the State TA had been effective, the Secretary of the Interior has recently held that such state created third party interests in TA'd lands are valid existing rights under ANCSA even though the state itself does not take title to the TA'd lands because of Native selection. Secretary's Order Nos. 3016, December 14, 1977, and 3029, November 20. 1978. Incidentally, the state statute on which Stratman and Burton rely had been repealed in June of 1976, before they even filed their lawsuit.

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In sum, the federal grazing leases covering the Leisnoi lands on Kodiak Island remain in effect and are valid, and Leisnoi must and will respect them. Further, if they had a State right to a renewal, (assuming that the State's repeal of its statute was not binding as to them), they have, under the Secretary's Orders above noted, a valid existing right to such a renewal.

The lawsuit based on the amended complaint was dismissed by the Federal District Court in Anchorage on October 16, 1978 as moot (copy of opinion attached), Leisnoi having relinquished the limited acreage covered by the Stratman and Burton grazing leases because it came to the conclusion that the land, burdened in any event by a long term lease, was simply not worth fighting over. The District Court also held that whatever rights Stratman and Burton might have to a state lease were preserved as valid existing rights and finally, the Court noted that Stratman and Burton's complaint appeared to be in violation of Rule 17(a) of the Federal Rules of Civil Procedure, since the grazing leases were held not by Stratman and Burton but by corporations.

It is significant, I believe, that Mr. Anderson's interest in Leisnoi and Koniag surfaced only after the District Court dismissed the Stratman and Burton litigation.

The Stratman and Burton lawsuit places these charges against Leisnoi in perspective. Stratman and Burton are

asserting a concern about their private business interests (which in fact cannot be harmed) out of imagined fears of "Native control." Mr. Anderson and Mr. Bernton appear to have been mislead, on the basis of pious mouthings of fraud by people with a private business axe to grind. But then, neither Mr. Anderson nor Mr. Bernton appear to have done much, if any, homework about what their informants may have been up to.

Stratman and Burton have filed a notice of appeal with the Ninth Circuit Court of Appeals. We regard this appeal as sham and frivolous and have moved to dismiss it without the necessity of briefing.

The fact of the matter is that even without counting Leisnoi's land entitlement on the mainland, Koniag and the other Koniag certified villages would still be giving up on the Alaska mainland about the same acreage as will be received on Afognak Island under the Konaig Amendment. So, again, there is much sound and fury which signifies nothing except that a small band of diehards in Kodiak who chose not to have their charges tried before an administrative law judge of the Department of the Interior at the proper time and who got nowhere in court, are moving heaven and earth to destroy Leisnoi, Karl Armstrong and Koniag. It is time to call a halt to this kind of persecution and I think we are entitled to demand, not simply ask, that others be held to the rules.

I would also point out that none of the people who are throwing these charges about have appeared before either this Committee or the Senate Committee, although there has been ample opportunity for them to do so over the years. The Koniag Amendment itself has been a matter of common knowledge in Kodiak since last summer. Now, at the last minute, they launch a lurid campaign through Mr. Anderson.

Further in connection with the relation of the uncertified villages to the Koniag Amendment, I call your attention to my prepared testimony before your Committee on February 8, and particularly to pages 3 and 4 (a copy of my testimony is enclosed).

Before closing, I would like to address a few additional comments on the tenor of Mr. Anderson's articles.

With respect to the uncertified villages which Mr. Anderson calls "phantom," Mr. Anderson conveniently overlooks the fact that two federal courts, the Federal District Court in Washington and the United States Court of Appeals for the District of Columbia, concurred in concluding that in reversing the BIA determination of eligibility, the "higher ups" in the Department of the Interior, to borrow Mr. Anderson's phrase, committed gross violations of due process of law. So outraged was Judge Gesell by the Department's conduct that he ordered that the last untainted decision within the Interior Department on the villages' eligibility be

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reinstated. This was the BIA holding in each case that the villages were eligible. Koniag v. Kleppe, 405 F. Supp. 1360 (1975). The United States Court of Appeals for the District of Columbia Circuit did not disagree with Judge Gesell's finding of violation of due process. That Court disagreed only with Judge Gesell's remedy and ordered that the cases be returned to the Department of the Interior for new administrative eligibility proceedings (free of due process violations) on appeals from the BIA's favorable determinations. Koniag v. Andrus, 580 F.2d 601 (1978). There is, therefore, at this time no outstanding determination of ineligibility by the Department of the Interior. The Department's determination to that effect was vacated by the District Court and the Court of Appeals. Renewed administrative proceedings will leave in doubt for several more years land entitlements affecting all of the Alaska Native regions. See the first paragraph, page 4, of my testimony.

As respects Leisnoi, ever since its certification Leisnoi has been treated by the Secretary of the Interior as an eligible village like all others, and it is entitled to that treatment. At no time in their litigative attempts to frustrate Leisnoi's and Koniag's rights were the plaintiffs willing to seek an injunction against the Secretary's treating Leisnoi as an eligible village. This unwillingness to

put their claim to the ultimate test bespeaks volumes about the motives of Leisnoi's tormentors and Mr. Anderson's informants.

In Mr. Anderson's first and second articles, he refers to a federal grand jury indictment. The impression is left that Koniag and Mr. Armstrong were among those indicted. This is not so. The indictment Mr. Anderson is talking about was returned by a federal grand jury in Anchorage in 1976 against one of the seven uncertified village corporations, Shuyak, and two of its officers, on grounds of attempting to defraud the United States in claiming eligibility. This indictment followed what I understand to have been an extensive investigation. No indictment was returned against any other village, nor against Koniag, nor against any other persons including Mr. Armstrong.

After obtaining the indictment, the U. S. Attorney's Office in Anchorage proposed to the defendants that the criminal proceedings be held in abeyance pending the outcome of the village eligibility cases then before the United States Court of Appeals for the District of Columbia in which Shuyak was one of the plaintiffs. This is unusual procedure to hold up a criminal prosecution pending the outcome of civil litigation and hardly indicates that the prosecutors thought they had a strong case.

Further, a second most curious circumstance turned up.

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The U. S. Attorney's Office, it was learned, had not presented to the grand jury exculpatory evidence that would have been given, had he been called to testify before the grand jury, by the Interior Department attorney who had been assigned during the village eligibility proceedings to personally look into the Shuyak application. Upon this attorney's giving an affidavit to the effect that he had made an investigation and reported his conclusions and findings to the FBI, but that for reasons unknown to him he had not been called to testify before the grand jury, the U. S. Attorney's Office in Anchorage had the indictment dismissed for want of prosecution. This is the affidavit that Mr. Anderson in his first column, that of February 21, referred to as "the strange affidavit" which "knocked the bottom out of the case." Of course it knocked the bottom out of an indictment handed down by a grand jury from which exculpatory evidence had been withheld. What is "strange" about this is that exculpatory information given by a federal official was withheld by the prosecutors from the grand jury.

Attached is the affidavit of the Interior Attorney. The Committee will have no difficulty in determining whether it is this attorney's conduct or Mr. Anderson's which is "strange!"

Then there is the outrageous personal attack on Mr. Armstrong which was the centerpiece of the second article,

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that of February 22. It may be that what bothers Mr. Anderson and his assistant Mr. Bernton is that Karl Armstrong does not fit what the column reveals to be Mr. Bernton's (and Mr. Anderson's) stereotype of an Alaska Native -- a person who, to use the column's language, is a "simple, semi-literate Eskimo fisherman or Indian trapper." This characterization is insulting to the Alaska Natives. Moreover, it betokens that paternal state of mind in which the "good" Alaska Natives are docile simple minded souls, content to have others decide their fate and happy to be allowed to remain in their homeland as sort of living exhibits in a human zoo for the amusing tolerance of non-Indian exploiters and columnists.

Admittedly Mr. Armstrong is not shy. Admittedly he is given at times to acerbic comment. But I submit that Mr. Anderson's own approach to these matters is hardly that of the genteel drawing room and as Mr. Anderson's column demonstrates, he himself is not one to approach a matter under "Marquis of Queensbury Rules." Mr. Anderson speaks of Mr. Armstrong's use of "alliterative invective." One must of course concede Mr. Anderson's expert qualifications as an alliterist. As any regular reader of his column will testify, Mr. Anderson's claim to all-world superiority in that regard has gone without serious challenge since Spiro Agnew's ghost writer quit the field.

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Perhaps it infuriates Mr. Anderson and Mr. Bernton that Mr. Armstrong, a former newspaperman, is not about to be pushed around and that he reacts accordingly when being interviewed by a man who, in effect, announces that he already knows that Mr. Armstrong, Koniag, Leisnoi and the uncertified villages are frauds, and then offers to change his mind if Mr. Armstrong will prove otherwise to his satisfaction.

While Mr. Armstrong's style may grate, it hardly warrants Mr. Anderson and company's engaging in character assassination. While Mr. Armstrong's adjectives are perhaps not those that one would utter in the calm and cloistered atmosphere of a library, some allowance must be made, I think, for the provocation to which Mr. Armstrong has been subjected with these constantly reiterated charges.

As regards the availability of the identity of the members of the "Citizens Action Group," in depositions taken in the Stratman and Burton litigation, the plaintiffs testified that CAG kept no membership lists or financial records, and that there were no officers or directors. And Mr. Anderson's characterizes these people as "neither weird nor mysterious." Not surprisingly, Mr. Bernton "had no trouble locating members of the" CAG. To Leisnoi, however, the organization's makeup and membership have an ectoplasmic, or to use one of Mr. Anderson's favorite terms, "phantom" quality.

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In typical Anderson style, he concludes his attack on Mr. Armstrong with a paragraph which infers, but does not quite openly charge, that Mr. Armstrong really does not qualify as an Alaska Native.

Mr. Armstrong, along with some three thousand other enrollees, was originally held not to have qualified as a "Native" by the Anchorage enrollment office of the BIA because that particular office applied erroneous presumptions and failed to utilize the complete records available in the case of applicants in whose line of ancestry there was "creole" blood. In this case "creole" was a term of Russian usage (borrowed from the French) which was loosely applied to any person with an ancestor that was the child of a marriage between a Russian male and a Native female (There were no Russian women in Russian Alaska).

In Mr. Armstrong's case, a maternal ancestor was simply put down by the Anchorage enrollment officer as of "unknown" origin, with no attempt to trace her lineage. Mr. Armstrong appealed.

Appeals on enrollment went not to the BIA, as Mr. Anderson says, but to the Regional Solicitor of the Department of the Interior in Anchorage. His office was also assigned the entire "creole" problem and all creole cases were taken out of the local enrollment office's hands by the Interior Department when it became aware, through Mr. Armstrong's

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appeal and thousands of others, that the local BIA enrollment office was committing gross and repeated errors in creole cases.

The Regional Solicitor, with approval of his Washington superiors, issued a detailed memorandum of how such cases would be handled, including an independent, disinterested analysis of the original Russian Orthodox Church records in the Russian language by qualified scholars. That memorandum also corrected the egregiously erroneous presumptions that had been used by the local office. A copy of the Regional Solicitor's memorandum of April 3, 1974 is enclosed.

Upon a full examination of the relevant Russian Orthodox Church records and the application of proper rules, Mr. Armstrong and in all, several thousand others similarly situated, were held to be qualified as Natives.

This situation had threatened to decimate Native enrollment in three Alaska Native regions, not only Koniag, but the Aleut and Cook Inlet regions as well. Mr. Armstrong, again perhaps in a fashion which would not comport with Mr. Anderson's stereotype of a "simple, semi-literate Eskimo fisherman or trapper," not only appealed his own case, but was instrumental in bringing the erroneous creole case practices of the Anchorage enrollment office to light. His interest and insistance that corrective action be taken, not simply for himself but for the many others who were the vic-

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tims of those erroneous practices, was indirectly responsible for saving the benefits of the Settlement Act for thousands of people. For that he deserves commendation, not villification from the Andersons and the "Citizen Action Groups" of this world.

Finally, there are the reiterated allusions to information from unnamed and unidentified "Interior Department" and "Justice Department" "investigators" or "sources."

Mr. Anderson, while it is not apparent on the face of his articles, is, after all, writing about events that transpired in 1973 and 1974, for that is when village applications were filed and the reviews by BIA were made. With all of Mr. Anderson's references to the "investigators" and "sources" and his shouts of fraud and comparisons with Tea Pot Dome, one must inquire why weren't there more indictments followed by prosecutions and convictions? The government "sources" surely haven't been sitting on evidence of criminality, waiting for Mr. Anderson to "reveal all" in his column five years and more after the alleged plot was hatched and the alleged criminal events occurred.

The answer is obvious. There was an intensive criminal investigation. It produced but one indictment, which then backfired. What we are hearing now are the screams of the disappointed. Tallulah Bankhead's classic comment, "There is less in this than meets the eye," perfectly describes Mr.

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Anderson's articles. It is time, long since past time, to call a halt to these smears.

The Koniag Amendment is no theft and no fraud. If it is enacted the public interest will be the gainer, not the loser.

If the Koniag Natives are forced to remain on the Alaska mainland, their land, almost 350,000 strategically located acres, land of incalculable wildlife and wilderness values, will not be returned to public ownership to be available for inclusion in a federal wildlife refuge or for selection by the State of Alaska. The Secretary of the Interior, in testifying before your Committee on February 13, stated that he now recommends that a refuge be established on federal lands on the Alaska Peninsula because, since he made his 1977 recommendation that there be a study of land status in the area, "land ownership patterns have become considerably clearer, so it is now appropriate to establish a refuge in this highly important area." The Secretary gave the same testimony the next day before the Merchant Marine and Fisheries Committee. The reason why "land ownership patterns have become considerable clearer" is, of course, the emergence of the Koniag Amendment.

And as for the alleged deleterious impact of the Koniag Amendment on Afognak Island should the amendment become law, I refer you once again to my testimony, particularly to pages 7 and 8, paragraphs 2, 4, 6, 9, 10 and 11.

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The Koniag Natives are not stealing anything. They are offering a trade, a bargain from which all parties will benefit, as they should in any negotiated transaction. It is no accident that the Koniag Amendment is supported by the Alaska Coalition, the State of Alaska, the Kodiak Island Borough, and the Department of the Interior. It benefits each. As I stated in my recent testimony before your Committee:

> The Koniag people are realists. They have understood early and well that no matter how unfair the operation of ANCSA has been in their case by reason of circumstances over which they have no control, springing largely from decisions taken in Washington as long ago as the turn of the century without their knowledge or consultation, no proposal to rectify their situation is going to be viable unless it deals with the interests of others who are affected in a manner in which those others regard as fair and reasonable.
>
> Realizing that, Koniag over a period of almost eight months painstakingly negotiated with the Department of the Interior, the Alaska Coalition, the Alaska state government and the Kodiak Island Borough. In each instance, as examination of details revealed specific problems, they were resolved in a mutually satisfactory fashion. In the end, Koniag was able to present to the Congress, before the Senate Committee completed its work on last year's version of H.R. 39, a legislative proposal which was supported by the Alaska Coalition, the Alaska state government, the Kodiak Island Borough and the Department of the Interior, in addition to Koniag, the Koniag villages and the Alaska Natives themselves through the Alaska Federation of Natives.
>
> The Koniag Amendment is a finely tooled, delicately balanced resolution of a number of complex problems.

I apologize for the length of this letter, but as you and I know, there is only one way to deal with blunderbus

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charges and that is with detailed rebuttal. The Koniag Natives do not apologize for the Koniag Amendment. It will be tragic indeed if the public is denied Koniag's mainland holdings and those Natives of Alaska who suffered the most from the incursion of the white man beginning with the Russians and who, but for the Koniag Amendment, would receive the least, should both be deprived of this opportunity by Mr. Anderson's patent attempt to frighten the members of this Committee and the Congress.

There are, and can be, legitimate differences of opinion over what constitutes "residence" under ANCSA, and use and occupancy under the regulations. Leisnoi was confirmed under the Department's standards and under the BIA standards and procedures which it applied in certifying more than 200 Native villages. The uncertified villages, although the holding of ineligibility has been vacated, are confronted with more years of heavy expense and emotional strain if they continue the fight for full certification. They have reached agreement with the Department of the Interior on the settlement that is included in the Koniag Amendment. It imposes what amounts to no land or additional money obligations on the government.

I should be very happy to supply further information if you wish, but I do not propose to try Native eligibility issues in the newspapers.

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I am confident that this Committee will not let a handful of Kodiak malcontents and Mr. Anderson destroy Koniag's future and the status of Leisnoi as a village under ANCSA.

Sincerely yours,

Edward Weinberg
of DUNCAN, BROWN, WEINBERG & PALMER, P.C.

EW:vcr

Enclosures

cc: Honorable John Seiberling
Honorable Don Young
Honorable Henry Jackson
Honorable Ted Stevens
Honorable Mike Gravel
Honorable John B. Breaux
Honorable Cecil D. Andrus

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